Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States

KENNETH TALMON,
Petitioner,

v.

CENTRAL STATES, SOUTHEAST & SOUHTHWEST AREAS PENSION FUND,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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Question Presented

Whether it is a violation of due process to determine ERISA denial of benefits claims under the arbitrary and capricious standard of review rather than de novo.

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Opinions Below

The ruling of the United States Court of Appeals for the Sixth Circuit dated May 14, 2007 affirming the decision of the District Court was not recommended for full-text publication and is reproduced at App. A at 1a.

The order of the United States District Court of the Northern District of Ohio dismissing the Petitioner's complaint dated January 6, 2007 is reproduced at App. B and C at 6a, 21a.

Jurisdiction

The order of the United States Court of Appeals for the Sixth Circuit sought to be reviewed was entered on May 14, 2007. This petition is timely filed under 28 U.S.C. § 2101 and Supreme Court Rule 13.1 because it is being filed within 90 days of the entry of the order sought to be reviewed. This court has jurisdiction to review the order of the United States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. § 1254.

Statutory Provisions Involved

The relevant statutory provision is ERISA § 502(a), 29 U.S.C. § 1132.

Statement of Case

The jurisdiction of the district court was invoked under 28 U.S.C. § 1331 (federal question). The Petitioner brought claims for breach of fiduciary duty and denial of benefits under Section 502 of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1132. The district court

dismissed Petitioner's complaint and granted Respondent's Motion of Judgment on the Administrative Records as to all claims.

A. Summary of the Allegations in the Complaint

The Petitioner, Kenneth Talmon, began employment on or about 1969 with Southern Express a participating employer in the Central States Southeast and Southwest Areas Pension Fund. Petitioner worked without any break in service from 1969 to 1986 which qualified him to receive certain benefits under the pension plan.

The Petitioner was a combination driver in Cleveland, Ohio. Pursuant to the national master agreement he was able to follow his job based upon seniority. Petitioner has argued for several years that Illinois California Express (hereinafter "ICX") did not shut down its operations in Ohio in 1980. This is substantiated by Bobby Shank, a fellow driver. This is also substantiated in Kevin McDonald's memorandum. ICX, in Kansas, hired drivers off the street, in violation of Petitioner's seniority. This was substantiated by the Affidavit of Tom Koeger The Affidavit of Ken Criss substantiated that Petitioner worked for Pacific Intermountain Express Company (hereinafter "P.I.E.") in 1969. Teamsters Local Union No. 293 has claimed that Petitioner had a break in service in 1968 which is false. The incorrect perceptions of Local Union No. 293 and Local Union No. 407 has resulted in Petitioner not receiving his full pension rights.

Frank Burdell, President of Local Union No. 407, investigated Petitioner's claims and concluded based upon the evidence that Petitioner did not have a break in service. Mr. Burdell further concluded that Petitioner was entitled to credit for additional years because he was not allowed to follow his

job ar hat ICX never correctly processed a Change of Operations in Ohio. ICX continued operations in Ohio until 1985. Petitioner was essentially deprived of the right to work from 1980 to 1985 at ICX. Petitioner was injured in 1990 and never worked thereafter. Moreover, Petitioner's Social Security records demonstrate that from January to March 1968 Petitioner contributed $1,696.55; from April to June he contributed $2,387.29; from July to September he contributed $1,658.67; and from October/November he contributed $929.52 from his combined work assignments at American Vineyards Company, Inc., and United Vintners, Inc. In addition, Petitioner worked at Watkins Furniture Company in December 1968.

Petitioner's service has also been miscalculated for 1969. Petitioner worked 28 weeks for Southern Express, which became ICX and worked for Lee Way Motor Freight, Inc., in August/September 1969. In 1969 Petitioner also worked for Admiral Merchants Motor Freight, Inc.; P.I.E.; Michigan Express; May Company; Wilson Motor Freight; Snyder Motor Freight; Truck Rail, Inc.; U.M.H. Steiner, Inc.; and R.H. Eckenroth Sales Company, which were required to make contributions to Local Union No. 407. All of the foregoing was submitted to Respondent by Petitioner to no avail. The Respondent's decision to deny Petitioner the additional credit was without any basis in the administrative record. Petitioner was done a severe injustice and should be given additional credit toward his full pension of approximately $2,500.00 per month. Respondent Central States refused to pay Petitioner his proper benefits under the pension plan alleging that there was a break in Petitioner's service which disqualifies him from receiving his full benefits under the pension plan. On or about 1980 Petitioner was laid off from employment by Illinois California Express, also

known as ICX. That Petitioner suffered and continues to suffer financial loss as a result of Respondent's actions.

B. The Decisions Below

The District Court dismissed the complaint holding that ERISA bars fiduciary duty claims on behalf of a participant suing for individual benefits, and on the administrative record, Central States' denial of benefits was not arbitrary and capricious.

The Court of Appeals affirmed the Judgement of the District Court. The Court stated in its decision that the district court correctly applied the arbitrary and capricious standard of review and that the Petitioner was ineligible for a Partial Pension. The Court of Appeals did not issue a full written opinion.

REASONS FOR GRANTING THE PETITION

This case presents an important issue whether it is a denial of due process to review ERISA denial of benefits under the arbitrary and capricious standard of review. The arbitrary and capricious standard of review deprives an individual of his due process rights regarding the important property interest of pension benefits.

I. THE STANDARD OF REVIEW FOR AN ERISA DENIAL OF BENEFITS CLAIM SHOULD BE DE NOVO WHEN THE ARBITRARY AND CAPRICIOUS STANDARD OF REVIEW RESULTS IN A DENIAL OF DUE PROCESS.

The standards of review for determining Employee Retirement Income and Security Act denial-of-benefits claims

are well-established. In cases in which a plan administrator is given no discretionary authority by the plan, review of the plan administrator's decision by the district court as well as the court of appeals in de novo, with respect to both the plan administrator's interpretation of the plan and the plan administrator's factual findings. When conducting a de novo review, the district court must take a fresh look at the administrative record but may not consider new evidence or look beyond the record that was before the plan administrator. *Wilkins v. Baptist Healthcare Systems, Inc.*, 150 F. 3d 609 (6th Cir. 1998).

This standard differs form the arbitrary and capricious standard of review that is used when benefits plan gives the plan administrator discretionary authority to determine eligibility for benefits or construe the terms of the plan. *Firestone Tire and Rubber Co. v. Bruch* , 489 U.S. 101, 115 (1989). Prior to the *Firestone* decision, a vast majority or courts reviewed ERISA claims under the deferential arbitrary and capricious standard of review, permitting claims to be resolved "without extensive inquiry into the merits of the dispute and by the liberal use of procedural devices such as summary judgment." James L. Nolan, *Defending the Insurance Company Against Claims for Wrongful Denial in Administration of Employee Benefits Plans*, C877 ALI-ABA 193, 223 (1994). A de novo review of the administrative record would have allowed Petitioner to provide important relevant evidence to the court indicating that he did not suffer a break in service and therefore was entitled to receive his full pension benefits.

The District Court's application of the arbitrary and capricious standard of review of Petitioner's claims violated Petitioner's due process rights. The Due Process Clause of the Fourteenth Amendment provides: Nor shall any state deprive

any person of life, liberty, or property, without due process of law. Historically, this guarantee of due process had been applied to deliberate decisions of government officials to deprive a person of life, liberty, or property. The Due Process Clause was intended to secure the individual from the arbitrary exercise of the powers of government. By requiring the government to follow appropriate procedures when its agents decide to deprive any person of life, liberty, or property, the Due Process Clause promotes fairness in such decisions. And by barring certain government actions regardless of the fairness of the procedures use to implement them, *e.g.*, it serves to prevent government power from being used for the purpose of oppression.

The Due Process Clause of the Fourteenth Amendment has historically been applied to deliberate decisions of government officials to deprive a person of life, liberty, or property, reflecting the traditional and common-sense notion that it is intended to secure the individual from the arbitrary exercise of the powers of government.

The lower Courts' erroneous decisions deprived Petitioner of his ERISA benefits, an important property interest. This deprivation has a had a serious impact on Petitioner's quality of life during a time that he should be financially secure according to the terms of the Collective Bargaining Agreement that governed his employment as a truck driver and a member of the Teamsters Union.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 06-3253

File Name: 07a0332n.06
[Filed: May 11, 2007]

NOT RECOMMENDED FOR
FULL-TEXT PUBLICATION

KENNETH TALMON,	)
Plaintiff-Appellant,	)
	)
v.	)
	)
CENTRAL STATES, SOUTHEAST & SOUTHWEST AREAS PENSION FUND,	)
Defendant-Appellee.	)
	)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

BEFORE: MARTIN and DAUGHTREY, Circuit Judges; SCHWARZER, District Judge.*

PER CURIAM. Kenneth Talmon appeals the district court's judgment dismissing his claim against Central States Southeast and Southwest Areas Pension Funds (Central States) for a Partial Pension. Talmon's complaint alleged breach of fiduciary duty and denial of benefits under section 502 of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1132.[1] He contended that Central States had incorrectly calculated the number of years of qualifying service to which he was entitled. Central States moved to dismiss the breach of fiduciary duty claim and for judgment on the administrative record on the benefits claim. The district court, in a well-reasoned opinion, granted both motions, holding that (1) ERISA bars fiduciary duty claims on behalf of a participant suing for individual benefits, and (2) on the administrative record, Central States' denial of benefits was not arbitrary and capricious. We adopt the district court's opinion and affirm.

In his appeal Talmon does not challenge the dismissal of his fiduciary breach claim. His principal argument in this court is that the district court used the wrong standard in deciding the motion for judgment on the administrative record and should have reviewed the trustees' decision to deny

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* The Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

[1] Talmon also alleged a breach of the collective bargaining agreement by a second defendant, International Brotherhood of Teamsters Truck Drivers Union Local 407, but later voluntarily dismissed that claim.

benefits de novo rather than under the "arbitrary and capricious" standard. As the district court correctly observed, the appropriate standard of review in ERISA cases depends on the terms of the plan in question. "[U]nless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan," the decision of the administrator is reviewed de novo. *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). "If the plan gives such discretionary authority, [the court] reviews the administrator's decision to deny benefits using the highly deferential arbitrary and capricious standard of review." *Darland v. Fortis Benefits Ins. Co.*, 317 F.3d 516, 527 (6th Cir. 2003) (internal quotation omitted). Both parties agree that the district court may only consider the evidence that was before the plan administrator at the time of the original decision. *See, e.g.*, *Perry v. Simplicity Eng.*, 900 F.2d 963, 967 (6th Cir. 1990) ("The de novo standard of review, like the . . . arbitrary and capricious standard, does not mandate or permit the consideration of evidence not presented to the administrator.").

Talmon offers no legal or factual support for his contention that the district court or this court should review the administrator's decision de novo. His only argument as to *why* that standard should be used is that applying the arbitrary and capricious standard "results in [an] unjust and inequitable decision." Under the terms of Central States' Trust Agreement, "[t]he Trustees are vested with discretionary and final authority in making all such decisions, including Trustee decisions upon claims for benefits by . . . claimants, and including Trustee decisions construing plan documents of the Pension Fund." The district court therefore correctly applied the arbitrary and capricious standard.

"Under [the] deferential 'arbitrary and capricious' standard, [the court] will uphold a benefit determination if it is rational in light of the plan's provisions." *Darland v. Fortis Benefits Ins. Co.*, 317 F.3d 516, 527 (6th Cir. 2003) (internal quotation omitted). "[W]hen it is possible to offer a reasoned explanation, based on the evidence, for a particular outcome, that outcome is not arbitrary or capricious." *Id.* (internal quotation omitted).

In support of his claim for a Partial Pension, Talmon contended that Local 293 incorrectly recorded his credit for 1967 to 1969 and charged him with a break in service in 1968, and that he was entitled to work for Illinois California Express (ICX) (and therefore earn credit) from 1980 to 1985. Based on the undisputed fact that Talmon left covered service no later than 1985, the Central States Trustees concluded that even if he had established full years of contributions from 1980 through July 1984 (when ICX went bankrupt) and full years of credit under Local 293's Pension Fund from 1967 to1969, he still would not have established the thirty years of Combined Credited Service (required when a participant leaves covered employment before age fifty) to qualify for a Partial Pension.

The Trustees' determination that Talmon was ineligible for a Partial Pension was rational and supported by the evidence. Even if Talmon were awarded credit for all the years in dispute, he would still fall far short of the requisite thirty years of credited service for a Partial Pension.

The district court ably summarized the relevant evidence and correctly identified the applicable law. Given that treatment of the plaintiff's claims, the issuance of a full written opinion by this court would be duplicative and serve no precedential purpose. We therefore AFFIRM the judgment

of the district court on the reasoning set forth in that court's opinion and order filed January 6, 2006.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No.: 1:05 CV 1330

[Filed January 6, 2006]

KENNETH TALMON,
Plaintiff,

v.

CENTRAL STATES SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, *et al.*,
Defendants

JUDGE SOLOMON OLIVER, JR.

ORDER

On May 16, 2005, Plaintiff Kenneth Talmon ("Plaintiff" or "Talmon") filed the instant action against Defendants Central States Southeast and Southwest Areas Pension Fund ("Defendant" or "Central States") and Local 407 International Brotherhood of Teamsters Truck Drivers Union ("Local 407"), alleging (1) breach of fiduciary duty under ERISA;(2) lack of compliance with benefit plans under ERISA; and (3)

breach of collective bargaining agreement ("CBA"). On June 10, 2005, Plaintiff voluntarily dismissed all claims against Local 407, with prejudice, pursuant to Fed. R. Civ. P. 41(a)(1)(ii). The dismissal left claims one and two pending against Central States only.

On July 1, 2005, Central States filed a Motion to Dismiss with respect to the first claim. (ECF No. 7). Talmon has yet to respond to the Motion to Dismiss. On August 2, 2005, Central States filed a Motion for Judgment on the Administrative Record with respect to all claims. (ECF No. 9). Talmon has filed a brief in opposition, and Central States filed a reply brief. For the reasons that follow, both of Defendant's motions are granted.

I. FACTS

Talmon, a former truck driver, contends he is entitled to a Partial Pension of $2,500 per month from Central States, and that the Central States Pension Fund Trustees improperly rejected his pension claim. Central States is a multi-employer pension plan with 185,000 active participants, 180,000 retirees, and 16,000 survivors of retirees in over 30 states. (Nelson Aff. ¶¶ 13-14, ECF No. 9, Att. 2.)

A. Talmon's Work History and Pension Contributions

From August 3, 1963 to February 29, 1968, Talmon worked and accrued 4.33 years of credited service in a non-Central States pension fund, the Local Union 293 Pension Fund. (Mar. 23, 2005 Trustees Rep. 1, ECF No. 11, Ex. C.)

Talmon's employment history between February 29, 1968, and September, 1969, is not clear from the record. Talmon contends he was continuously employed during this

time period for a variety of employers, and belonged to both Local Union 293 and Local 407 as a member of the Central States Pension Fund. (*See* Criss Aff., ECF No. 13, Exh. A; Burdell Aff., ECF No. 13, Exh. E.)

It is undisputed that from September, 1969, until he was laid off in July, 1980, Talmon worked for Southern Express, and then ICX, as a member of Local 407. Southern Express and ICX were participants in Central States. (*Id.*) During this time period, Talmon accrued 10.75 years of service credit. (*Id.*) When ICX closed its Ohio operations in July, 1980, Talmon was 44 years old.

Talmon argues that when ICX closed its Ohio operations, the CBA required ICF to transfer him to a job in another ICX facility. Since ICX did not do so, Talmon asserts his pension should be credited for the additional 4.5 years between his 1980 layoff and ICX's 1985 bankruptcy. Talmon filed an unsuccessful grievance to this effect in 1984. (*Id.* at 2.)

There is no dispute about any period of time before 1963 or after 1985.

B. The Central States Pension Fund ("Fund")

The Central States Pension Fund Trust Agreement grants the Fund's trustees discretionary authority to construe plan documents, make decisions upon claims for benefits, and adopt rules and regulations for administering the Fund. (Trust Agreement 9, 12, 16-17, ECF No. 12, Exh. A.; Nelson Aff. ¶ 20, ECF No. 9, Att. 2.)

The Central States Pension Fund Plan Document ("Plan Document") describes the various types of pensions which may be earned by participants. Under the terms of the Plan

Document, a participant who attains his 57th birthday and has twenty years of credited service may obtain a Twenty-Year Service Pension. (Plan Document § 4.02, ECF No. 12, Exh. B.) A participant may obtain an Early Retirement Pension if they are under age 50 and have completed thirty years of credited service. (*Id.* at § 4.03.)

For participants who do not qualify for the above pensions because their credited service is divided between employers maintaining different pension plans, a Partial Pension is available. (*Id.* at § 5.01) However, Partial Pensions are only available if the participant would be eligible for a Twenty-Year Service Pension or Early Retirement Pension using combined credited service. (*Id.*)

If a plan participant has a One Year Break in Service, he ceases to be a participant, and any non-vested credited service is excluded. (*Id.* at § 3.05(e).) The Plan Document also discusses a "One Year Break in Service," defining it as any calendar year in which a participant receives less than ten vesting service weeks. (*Id.* at § 3.05(c).)

C. Administrative History

The history of pension claim disputes between the parties has been drawn out for more than twenty years.

On July 10, 1981, Talmon first asked Central States how many years of credited service he had accumulated towards his pension benefit. On July 21, 1981, it informed Talmon that he had accumulated 10.75 years of credited service. There is no evidence that Talmon disputed this calculation.

On July 9, 1993, Talmon again inquired about the status of his Central States pension. In an August 4, 1993 letter,

Central States reiterated its calculation of 10.75 years of credited service, and informed Talmon that since he left covered employment before reaching age 50, he needed 30 years of combined service credit to qualify for a Partial Pension.

On September 24, 1993, Talmon applied for a Partial Pension. On October 26, 1993, Central States sent a letter to Local Union 293 inquiring into how much credited service Talmon had compiled between 1962 and 1969. On March 14, 1994, before hearing back from Local Union 293, Central States rejected Talmon's application for a partial pension. Central States noted that even if Talmon was credited for his service with Local Union 293 between 1962 and 1969, his credited service would not add up to the 30 years he needed because he left covered service well before age 50. However, Central States did indicate that Talmon was eligible for a Vested Pension, which would provide him a substantially lower monthly payment than a Partial Pension.

Central States eventually heard from Local Union 293 on April 12, 1994. Local Union 293 indicated that Talmon sustained a break-in-service in December 1968, and the break-in-service caused him to forfeit his credited service under the terms the Local Union 293 pension plan.

Talmon continued to contact Central States between 1994 and 2002 regarding his pension benefits. At some point in late 2001, or early 2002, Talmon retained counsel to assist him in pursuing his pension benefits. On September 27, 2002, Talmon formally appealed Central States' decisions on his pension, arguing that he was entitled to credited service between his layoff in 1980 and ICX's bankruptcy in 1985, as well as additional credited service between 1967 and 1969.

On January 3, 2003, the Central States Benefits Claim Appeals Committee rejected the appeal, finding that:

> Even if Mr. Talmon had established full years of Contributions from 1980 through July 1984 (when ICX went bankrupt) under Central States Pension Fund and full years of credit with the Local Union 293 Pension Fund from 1967-1969, he still would not have established 30 years of Combined Credited Service (needed when a Participant leaves Covered Employment before age 50) to qualify for a Partial Pension.

(Jan. 3, 2003 Decision, ECF No. 12, Exh. C at 187.)

On February 1, 2003, Talmon appealed the decision to the Central States Board of Trustees. Before reaching its decision, Central States received a letter from Local 407 addressing some of the issues raised in the appeal. Local 407 stated that the only time period for which it contributed to the Central States Pension Fund on Talmon's behalf was between 1969 and 1980. The union also detailed some of the substantive reasons why Talmon would have difficulty winning a grievance for additional credited service between 1980 and 1985.

On March 23, 2005, the Central States Trustees met and declined to award Talmon additional credited service from 1980 to 1985. The Trustees noted than any claim ICX violated the terms of its collective bargaining agreement ("CBA") by laying off Talmon and refusing to transfer him in 1980 should have been brought in another forum, since Central States is not the proper forum to adjudicate a dispute over ICX's CBA. However, the Trustees did determine that Talmon was entitled to several additional months of credited

service in July and August 1969. The Trustees noted that even if it awarded Talmon credited service for all the time periods in dispute, it would still not add up to thirty years, and thus would not change the determination that he was ineligible for a Partial Pension.

Talmon subsequently appealed to this court.

II. STANDARD OF LAW

A. Motion to Dismiss

Rule 12(b)(6) of the Federal Rules of Civil Procedure allows the court to determine the legal sufficiency of a plaintiff's claims. *See Mayer v. Mylod*, 988 F.2d 635, 638 (6th Cir. 1993). Courts reviewing a 12(b)(6) motion must accept the well-pled factual allegations of the complaint as true and construe all reasonable inferences in favor of the plaintiff. *See Miller v. Currie*, 50 F.3d 373, 377 (6th Cir. 1995). However, the court is not required to accept conclusions of law or unwarranted inferences of fact cast in the form of factual allegations. *Blackburn v. Fisk University*, 443 F.2d 121, 123 (6th Cir. 1971). Accordingly, a court must determine "whether the plaintiff undoubtedly can prove no set of facts in support of [his] claim that would entitle [him] to relief" under a viable legal theory advanced in the complaint. *Columbia Natural Resources, Inc. v. Tatum*, 58 F.3d 1101, 1109 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 1041 (1996).

B. Motion for Judgment on the Administrative Record

Traditional summary judgment rules do not cleanly apply to ERISA benefit cases, where the district court is engaged in a review of the administrative record. *Wilkins v. Baptist Healthcare System, Inc.*, 150 F.3d 609, 619 (6th Cir. 1998)

(Gilman and Ryan, concurring). Where a district court is reviewing an ERISA decision in a case where the administrator has "discretionary authority to determine eligibility for benefits or to construe the terms of the plan," the court applies the arbitrary and capricious standard of review to the ERISA administrator's decision. *E.g., Darland v. Fortis Benefits Ins. Co.*, 317 F.3d 516, 527 (6th Cir. 2003). However, where the ERISA administrator does not have discretionary authority, the district court reviews the decision *de novo*. *E.g., Wilkins*, 150 F.3d at 613.

Talmon contends, without any factual or legal basis, that the *de novo* standard of review should apply. However, the Central States Pension Fund Trust Agreement expressly gives discretionary authority to the Trustees:

> The Trustees are vested with discretionary and final authority in making all such decisions, including Trustee decisions upon claims for benefits by participants and beneficiaries of the Pension Fund and other claimants . . .

(Trust Agreement, Art. V, § 2, ECF No. 12, Exh. A.) Therefore, under the well-established law of this Circuit, the court reviews the Trustee's decision under the arbitrary and capricious standard of review.

The arbitrary and capricious standard is "the least demanding form of judicial review of administrative action," and "[w]hen it is possible to offer a reasoned explanation, based on the evidence, for a particular outcome, that outcome is not arbitrary or capricious." *Davis v. Kentucky Finance Cos. Retirement Plan*, 887 F.2d 689, 693 (6th Cir. 1989) (quoting *Pokratz v. Jones Dairy Farm*, 771 F.2d 206, 209 (7th Cir. 1985)). Under the arbitrary and capricious standard,

the Trustee's decision must be upheld if rational in light of the plan's provisions or if "based on a reasonable interpretation of the plan." *Shelby County Health Care Corp. v. S. Council of Indus. Workers Health & Welfare Trust Fund*, 203 F.3d 926, 933 (6th Cir. 2000). Moreover, the district court "must accept a plan administrator's rational interpretation of a plan even in the face of an equally rational interpretation offered by the participants." *Morgan v. SKF USA, Inc.*, 385 F.3d 989, 992 (6th Cir. 2004).

III. LAW AND ANALYSIS

A. Breach of Fiduciary Duty

Central States makes several arguments as to why Talmon's breach of fiduciary duty claim under ERISA should be dismissed. First, Central States contends in its motion to dismiss that an ERISA breach of fiduciary duty claim for individual relief is not allowed when a plan participant also files a claim for ERISA benefits. Second, Central States asserts that a breach of fiduciary duty claim is barred by the applicable statute of limitations. For the reasons stated below, the court finds both arguments well-taken, and grants Defendant's motion to dismiss the breach of fiduciary duty claim.

1. Permissibility of ERISA § 502(a)(2) Claims along with 502(a) Claims

Section 502, the ERISA civil enforcement statute (29 U.S.C. § 1132) outlines the permissible ERISA claims which a participant may pursue in court. Participants may sue for individual benefits due under the terms of an ERISA plan under § 502(a)(1)(B). Participants may sue for a breach of fiduciary duty under both § 502(a)(2) and § 502(a)(3).

However, the ERISA statute and subsequent court interpretations have placed specific limits on suits for breach of a fiduciary duty.

For a suit under § 502(a)(2), 29 U.S.C. § 1132(a)(2), no individual relief or damages are available. Rather, any available relief under this section "inure[s] to the benefit of the plan, not an individual participant." *Whisman v. Robbins*, 55 F.3d 1140, 1149 (6th Cir. 1995). In the instant case, Talmon is not suing on behalf of the plan; he seeks recovery for his individual injury and damages. (Pl. Complt. ¶ 15, ECF No. 1.) Therefore, the claim must be dismissed. *E.g.*, *Adcox v. Teledyne*, 21 F.3d 1381 (upholding dismissal of ERISA fiduciary duty claim "because a cause of action under § 1132(a)(2) permits recovery to inure only to the ERISA plan, not to individual beneficiaries.")

Pursuant to the "catch-all" provision in § 502(a)(3), 29 U.S.C. § 1132(a)(3), a participant or beneficiary may bring an action for breach of fiduciary duty:

> (A) To enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of the subchapter or the terms of the plan.

29 U.S.C. § 1132(a)(3). In *Varity Corp v. Howe*, 516 U.S. 489, 512 (1996), the Supreme Court limited relief available under § 502(a)(3) to participants or beneficiaries who are not able to avail themselves of § 502's other remedies. The Sixth Circuit has applied *Varity* by precluding beneficiaries from bringing breach of fiduciary duty or other equitable claims under § 502(a)(3) when the claimant is simultaneously bringing a cause of action under § 502(a)(1)(B). *Marks v.*

Newcourt Credit Group, Inc., 342 F.3d 444, 454 (6th Cir. 2003); *Wilkins*, 150 F.3d at 615. In *Wilkins*, the court held that because § 502(a)(1)(B) provided a remedy for the plaintiff's alleged injuries that allowed him to bring a lawsuit to challenge the Plan Administrator's denial of benefits, the plaintiff did not have a right to a cause of action for breach of fiduciary duty pursuant to § 502(a)(3). In *Marks*, the plaintiff filed suit for denial of ERISA benefits under § 502(a)(1)(B) and for breach of fiduciary duty under § 502(a)(3). The Sixth Circuit affirmed the district court's dismissal of § 502(a)(3) breach of fiduciary duty claim, holding that "a participant cannot seek equitable relief for a breach of fiduciary duty under the catchall provision of § 502(a)(3) if the alleged violations are adequately remedied under other provisions of § 502." 342 F.3d at 454.

In this case, Talmon does not explicitly cite § 502(a)(1)(B) in his complaint. However, his second claim is for "lack of compliance with benefit plans." (Pl. Complt. Claim 2, ECF No. 1.) He seeks a higher pension benefit than Central States agrees he is entitled to. This is precisely the type of claim permitted by § 502(a)(1)(B), which allows an action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). Since Talmon is entitled to seek relief under § 502(a)(1)(B), he may not also seek relief for breach of fiduciary duty under § 502(a)(3). For these reasons, Defendant's Motion to Dismiss the breach of fiduciary duty claim is granted.

2. *Statute of Limitations*

Additionally, Plaintiff's claim is barred by the ERISA statute of limitations. The ERISA statute states:

> No action may be commenced under this title with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part [29 USCS §§ 1101 et seq.], or with respect to a violation of this part [29 USCS §§ 1101 et seq.], after the earlier of–
>
> > (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or
> >
> > (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;

29 U.S.C. § 1113. In the instant case, it is undisputed that Talmon first learned that Central States had calculated his credited service at 10.75 years in 1981. Thus, any breach of fiduciary duty claim arising from Central States' refusal to credit additional service time post-1980 or pre-1969 had a statute of limitations which expired in 1984. Any breach of fiduciary duty claim arising from Central States' interpretation of its ERISA plan documents expired in 1996, three years after Central States' 1993 rejection of Talmon's application for a Partial Pension.

Plaintiff argues, in conclusory fashion and without any factual or legal support, that the statute of limitations began to accrue when the appeal was denied in 2005. For the reasons stated above, this argument is without merit. The motion to dismiss is granted on the alternative grounds that the statute of limitations has expired.

B. Denial of Benefits

While it is not entirely clear from the briefing, Talmon appears to raise three specific challenges to the administrative decision: (1) he is entitled to additional credited service prior to 1969; (2) he is entitled to additional credited service after his 1980 termination; and (3) he is entitled to a Partial Pension under the terms of the Central States pension. The administrative decision of the Central States Pension Fund Trustees was not arbitrary and capricious on any of these issues.

1. Pre-1969 Credit

Talmon argues that he is entitled to an additional 4.33 years of credited service for pension contributions to the Local 293 pension fund between 1963 and 1969. The Central States Trustees concluded that since Local 293 independently concluded that Talmon had lost the credit because of a break in service, Central States had no authority to credit this service to Talmon's pension. Talmon has pointed to no provision in the Central States Pension Plan which gives Central States authority to credit service that another pension plan asserts was forfeited. Moreover, documents in the administrative record verify Local 293's position that Talmon forfeited his pre-1969 pension credit. Central States' conclusion that this is an issue Talmon should have taken up with Local 293 is not arbitrary and capricious, and is supported by the plan documents and the administrative record. Defendant's Motion for Judgment on the Administrative Record is granted as to this issue.

2. Post-1980 Credit

Talmon argues that he is entitled to additional credited service for the time that he did not work, but should have been working, for ICX after 1980. The Central States Trustees concluded Talmon was not entitled to additional credited service time because Talmon did not work after 1980, ICX did not pay pension contributions on his behalf after 1980, and any violation of ICX's CBA should have been raised with ICX. While Talmon cites affidavits which he asserts establish his seniority rights and his entitlement to a job with ICX after his 1980 termination, such evidence is irrelevant. The ICX CBA is not before the court now, and was not before the Trustees when they made their decision. If Talmon felt he should have been employed after 1980 under the terms of the CBA, he could have filed a grievance and litigated that issue. However, Talmon cites no order of reinstatement, no plan document, and no legal authority for the proposition that Central States should credit his pension for time he never worked, with money that was never paid to the pension. Under the terms of its pension plan, Central States is not required to credit contributions unless someone actually makes the contributions on behalf of an employee. There is no factual dispute that ICX never made contributions on behalf of Talmon after 1980. Accordingly, Central States' conclusion on this issue is fully supported by the administrative record, and is not arbitrary and capricious. Defendant's Motion for Judgment on the Administrative Record is granted as to this issue.

3. Partial Pension Availability

Talmon contends that he should be awarded a Partial Pension of $2,500 per month. The Central States Trustees noted that even if Talmon were awarded full credit for all of

the years in dispute, he still would not have sufficient credited service under the pension plan's terms to receive a Partial Pension. As with the other issues discussed above, Talmon has failed to make any factual or legal argument calling into question the Trustees' decision. Talmon points to no portion of the Central States Pension Plan which suggests that the Trustees' interpretation is incorrect, and does not propose any alternative interpretation. The Central States Pension Plan unambiguously requires 30 years of credited service for a Partial Pension when the participant retires before age 50. It is undisputed that Talmon was 44 when he stopped working, and would not reach 30 years of credited service even if he was given credit for the years disputed in this litigation. Thus, Central States' decision on this issue is fully supported by the administrative record, and is not arbitrary and capricious. Defendant's Motion for Judgment on the Administrative Record is granted as to this issue.

IV. CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss Count One (ECF No. 7) is granted, and Defendant's Motion for Judgment on the Administrative Record as to all claims (ECF No. 9) is also granted. Inasmuch as the court has dismissed all of Plaintiff's remaining claims, Defendant's Motion to Strike Plaintiff's jury demand and claim for punitive damages is denied as moot.

IT IS SO ORDERED.

/S/ SOLOMON OLIVER, JR.
UNITED STATES DISTRICT JUDGE

January 6, 2006

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No.: 1:05 CV 1330

[Filed January 6, 2006]

KENNETH TALMON,
Plaintiff

v.

CENTRAL STATES SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, *et al.*,
Defendants

JUDGE SOLOMON OLIVER, JR.

JUDGMENT ENTRY

The court, having granted Defendant's Motion to Dismiss Count One of Plaintiff's Complaint (ECF No. 7) and its Motion for Judgment on the Administrative Record as to all claims (ECF No. 9) in a separate order of this same date, hereby enters judgment for the Defendant and against the Plaintiff.

IT IS SO ORDERED.

/S/ SOLOMON OLIVER, JR.
UNITED STATES DISTRICT JUDGE

January 6, 2006

APPENDIX D

TITLE 29. LABOR
CHAPTER 18. EMPLOYEE RETIREMENT INCOME SECURITY PROGRAM
PROTECTION OF EMPLOYEE BENEFIT RIGHTS REGULATORY PROVISIONS
ADMINISTRATION AND ENFORCEMENT
(2007)

29 U.S.C. § 1132. Civil enforcement

(a) Persons empowered to bring a civil action. A civil action may be brought--

(1) by a participant or beneficiary--

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 [29 USCS § 1109];

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 105(c) [29 USCS § 1025(c)];

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title;

(6) by the Secretary to collect any civil penalty under paragraph (2), (4), (5), (6), or (7) of subsection (c) or under subsection (i) or (l);

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 609(a)(2)(A) [29 USCS § 1169(a)(2)(A)]);

(8) by the Secretary, or by an employer or other person referred to in section 101(f)(1) [29 USCS § 1021(f)(1)], (A) to enjoin any act or practice which violates subsection (f) of section 101 [29 USCS § 1021(f)], or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection; or

(9) in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this title [subtitle] or the terms of the plan, by the Secretary, by any individual who was a participant or beneficiary at the time of the alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts.

* * *

No. 07-182

FILED
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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

KENNETH TALMON,
Petitioner,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Petitioner may raise for the first time before this Court an issue of constitutional due process that was not raised in any form in the courts below?

2. Even assuming Petitioner had in fact raised the issue of due process, whether the use of the arbitrary and capricious standard of review, in ERISA benefits cases by federal courts, deprives a benefit's claimant of due process?

3. Even assuming Petitioner had in fact raised the issue of due process, whether the Sixth Circuit denied the Petitioner any due process rights when it held that the decision of the Trustees of an employee pension benefit plan was not arbitrary and capricious, and where Petitioner has not pointed to any evidence that he was prevented from including in the administrative record before the benefit plan Trustees?

PARTIES TO THE PROCEEDING

Petitioner

Kenneth Talmon is a retired participant of the Central States. Southeast and Southwest Areas Pension Fund.

Respondent

Central States. Southeast and Southwest Areas Pension Fund is a multiemployer pension benefit plan as defined by ERISA. 29 U.S.C. §§ 1002(2)(A) and 1002(37).

The Board of Trustees of the Central States. Southeast and Southwest Areas Pension Fund is the plan administrator of the Central States. Southeast and Southwest Areas Pension Fund within the meaning of ERISA. 29 U.S.C. § 1002(16)(B).

CORPORATE DISCLOSURE STATEMENT

Respondent does not have parent corporations and no public company owns stock in Respondent.

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IN THE

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No. 07-182

KENNETH TALMON,

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v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PERTINENT STATUTES

29 U.S.C § 1132(a) provides, in pertinent part, as follows:

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

29 U.S.C. § 1133 provides as follows:

In accordance with regulations of the Secretary, every employee benefit plan shall—

(1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and

(2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

* * * *

STATEMENT OF THE CASE

A. The Trustees' Denial of Mr. Talmon's Administrative Appeal.

Kenneth Talmon became a participant of the Central States, Southeast and Southwest Areas Pension Funds ("Central States") in 1969, when Southern Express first became obligated to make pension contributions for him to Central States. (ASA, pp. 550-552).[1] He worked for Southern Express and then for Illinois California Express ("ICX") under collective bargaining agreements, negotiated between his employers and affiliates of the International Brotherhood of Teamsters, requiring contributions to Central States, for the purpose of earning pension credits, until his layoff from ICX in July of 1980. He earned 10.750 years of Service Credit with Central States. (ASA, pp. 547-548). Mr. Talmon was 44 years old when he left Central States' covered service in 1980.

[1] "ASA __" refers to Appellee's Supplemental Appendix filed in the Sixth Circuit. "ADJA __" refers to the Appellant's Draft Joint Appendix filed in the Sixth Circuit.

Although Mr. Talmon qualifies for a Vested Pension from Central States, he does not qualify for any other benefit. He would need 30 years of Combined Service Credit to qualify for a Partial Early Retirement Pension, because he left covered employment before age 50.[2] No contributions were paid to Central States for Mr. Talmon after 1980. (ASA, pp. 540-541).

In 1993 Mr. Talmon applied for a Partial Early Retirement Pension, but his application was rejected by Central States because he had earned only 10.750 years of service credit. Mr. Talmon had claimed that he also earned service credit starting in 1962 with another pension fund, the Teamsters Union Local No. 293 Pension Plan, ("Local 293 Plan") and his credit with that Fund should be combined with the credit he earned with Central States. But, Central States advised him, even if he earned credit with the Local 293 Plan for 1962 to 1969, that amount of additional credit would still not allow him to meet the 30 year requirement. Then, on April 12, 1994, the Local 293 Plan informed Central States that Mr. Talmon had sustained a break in service in 1968, so he lost any credit he had earned with it. (ASA, p. 532).[3]

---

[2] The Central States Plan Document explains that a Partial Early Retirement Pension may be provided when a participant's credited service is not otherwise sufficient to create eligibility because the participant's years of employment were divided between employers maintaining different pension plans. Credited service accumulated by a participant under a Related Plan is recognized and credited by Central States as Related Credited Service. To be eligible for a Partial Pension, a participant must be eligible for a Partial Pension from a Related Plan. (ASA, p. 264).

[3] Mr. Talmon's petition incorrectly says, "Teamster Local Union No. 293 has claimed that Petitioner had a break in service in 1968 which is false." (Pet. for Cert. p. 2). A correct statement is that, "a totally separate and distinct employee pension benefit plan, Teamsters Union Local No. 293 Pension Plan, of Cleveland Ohio, wrote Central States on April 12, 1994 and told Central States that Mr. Talmon sustained a break in service under the plan and that his break would cause him to forfeit his credited service." (ASA, p. 532).

Mr. Talmon, through his attorney, filed an administrative appeal of Central States refusal to grant him a Partial Early Retirement Pension. During his appeal Mr. Talmon argued that, although ICX went out of business in Ohio in 1980, it continued to conduct business in other states until it went bankrupt and ceased business in 1985, so he should have been allowed to transfer to another ICX terminal to continue working to earn additional contributory credit. He also argued that he did not have a break in service with the Local No. 293 Plan. (ASA, pp. 502-507, 283-295).

On March 23, 2005 the Central States Trustees denied Mr. Talmon's administrative appeal for additional contributory credit based upon contributions which he said should have been paid by ICX for him after 1980. The Trustees however agreed that Southern Express was required to make employer contributions for him beginning July 23, 1969 (Southern Express had only made contributions for him starting in September of 1969). The additional credit awarded for 1969 meant that Mr. Talmon had earned a total of 11.250 years of service credit. But, the Trustees also explained that, even with the additional credit in 1969, and even if the Local 293 Plan certified 4.33 years of credit under that plan, and even if Mr. Talmon made the maximum amount of self-contributions allowable under the Central States' plan, he still could not establish 30 years of Combined Service Credit to become eligible for a Partial Early Retirement Pension. (ASA, p. 281). Because Central States granted Mr. Talmon additional contributory credit for employment with Southern Express (which increased his 1969 contributions to 22 weeks) his Vested Pension increased from $151.18 per month to $156.46 per month. (ASA, pp. 557-559).

B. The District Court Held That The Trustees' Decision Was Reasonable.

On May 16, 2005 Mr. Talmon sued Central States in the Northern District of Ohio alleging a fiduciary breach claim

and an ERISA benefits claim.[4] The district court examined the discretionary grants of authority, granted to the Central States Trustees in the Central States Pension Fund Trust Agreement and, because the Trustees had discretionary and final authority in construing their plan documents and making decisions upon claims for benefits, it determined that under the well-established precedent in the Sixth Circuit, the Trustees' decision would be reviewed under the arbitrary and capricious standard. (See, *Pet. for Cert.*, App. B, p. 13A). The district court rejected Mr. Talmon's arguments that he was entitled to additional credit under the Central States plan either prior to 1969 or after 1980. It pointed out that the Local 293 Plan had independently concluded that Mr. Talmon lost the credit he earned between 1963 to 1969 under that plan, because of a break in service. Central States had no authority to grant service which another pension plan determined to be forfeited. And, Mr. Talmon did not work after 1980 and ICX paid no pension contributions to Central States for him after 1980. The court stated that if Mr. Talmon felt he should have been employed after 1980 under the terms of a collective bargaining agreement, that issue should have been resolved by Mr. Talmon through the grievance procedure under the union contract. The district court concluded that, because Mr. Talmon was entitled to no additional credit prior to 1969 or after 1980, Central States' decision that he did not earn a Partial Pension was fully supported by the administrative record, and was not arbitrary and capricious. (*Id.* pp. 18A-20A).

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[4] The district court granted Central States' Motion to Dismiss with respect to the fiduciary breach claim. (*Talmon v. Central States, Southeast and Southwest Areas Pension Fund, et al.*, No. 1:05 CV 1330 (ND Ohio, January 6, 2006), *See*, App. B to *Pet. for Cert.*). Mr. Talmon did not challenge the dismissal of his fiduciary breach claim in the Sixth Circuit. (*Talmon v. Central States, Southeast and Southwest Areas Pension Fund*, Slip Op., 2007 WL 1376288 (6th Cir. May 11, 2007), *See*, App. A to *Pet. for Cert.*).

The district court entered judgment in favor of Central States on January 6, 2006. (*See, App. C to Pet. for Cert.*).

C. The Sixth Circuit Affirmed the District Court.

Mr. Talmon appealed to the Sixth Circuit and it affirmed the lower court. The Sixth Circuit found that Mr. Talmon offered no legal or factual support, either in the Sixth Circuit or the lower court, that the Trustees' decision should be reviewed *de novo*. The court pointed out that his only argument as to why the *de novo* standard should be used was that the arbitrary and capricious standard results in an unjust and inequitable decision. But there was no support for that claim. (*Pet. for Cert.*, App. A, p. 3A). The court found that the Trustees' decision was rational and supported by the evidence, and even if Mr. Talmon were awarded credit for all of the years in dispute, he would still fall far short of the requisite 30 years of service credit needed for a Partial Pension. (*Id.* pp. 4A-5A).

REASONS FOR DENYING THE PETITION

A. There Is No Compelling Reason To Grant Mr. Talmon's Petition.

After this Court's decision in *Lau Ow Bew*, 141 U.S. 583 (1891), this Court has exercised great restraint in granting certiorari. The power has been sparingly used and reserved for cases of "peculiar gravity and general importance" or "to secure uniformity of decision." *American Const. Co. v. Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372, 383 (1893). Mr. Talmon's case satisfies neither requirement and satisfies none of the "compelling reasons" listed in Supreme Court Rule 10. There is no conflict between the circuit courts on any issue raised by Mr. Talmon. Moreover, no important federal question was decided in a way which conflicts with decisions from this Court.

The reason Mr. Talmon advances for granting his petition is that the application of the arbitrary and capricious standard by the district court deprived him of due process.[5] However, Mr. Talmon failed to raise any due process objection to the "arbitrary and capricious" standard in the courts below. He therefore has waived this objection. *See, e.g., Solorio v. U.S.*, 483 U.S. 435, 451, fn. 18 (1987). Moreover, Mr. Talmon's argument, on its face, is illogical and inconsistent. On one hand, he says that had the district court afforded a *de novo* review of the administrative record, this would have allowed him "to provide important relevant evidence to the court indicating that he did not suffer a break in service and therefore was entitled to receive his full pension benefit." (*Pet. for Cert., p. 5*). But, on the other hand, Mr. Talmon says that the Trustees miscalculated his service and their decision to deny him additional credit "was without any basis in the administrative record." (*Pet. for Cert., p. 3*). In support of his conclusion that his pension was miscalculated, Mr. Talmon lists all the evidence he presented during his administrative appeal in support of his arguments for additional credit, including the fact that, "Frank Burdell, President of Local Union No. 407, investigated Petitioner's claims and concluded based upon the evidence that Petitioner did not have a break in service." (*Pet. for Cert. p. 2*). Mr. Talmon can not have it both ways. He can not say that the administrative record contains substantial evidence, including an investigation by a former local union President, which supports that he did not have a break in service, but then also argue that, had the district court applied a *de novo* review, he would have been able to provide relevant evidence indicating he did not have a break in service. Mr. Talmon does not

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[5] The arbitrary and capricious standard of review in ERISA Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) actions challenging denial of benefits based on plan interpretations is appropriate when plan administrators exercise discretionary powers. *Firestone Tire & Rubber Company v. Bruch*, 489 U.S. 101 (1989).

indicate what "important relevant evidence" he is referring to. Presumably, the evidence of Frank Burdell, who investigated his break in service, was important and relevant, but he concedes that Mr. Burdell's evidence in fact was presented to the Trustees and rejected by them.

When the Sixth Circuit upheld the district court's application of the arbitrary and capricious standard to Mr. Talmon's administrative appeal, it pointed out, "Both parties agree that the district court may only consider the evidence that was before the plan administer at the time of the original decision." (*Pet. for Cert.* App. A, p. 3A). Indeed, even though Mr. Talmon now contends that the *de novo* review should apply, nonetheless, he still recognizes in his petition that, even under a *de novo* review, the reviewing court "may not consider new evidence or look beyond the record that was before the administrator." (*Pet. for Cert., p. 5*). But, now in an argument never made in the lower courts, Mr. Talmon says that he was deprived of due process by the district court's application of the arbitrary and capricious standard because a court's review is limited to the administrative record. (*Pet. for Cert.* p. 5).

Mr. Talmon never raised the argument in the lower courts that he wanted to submit any evidence beyond what was already in the administrative record. He never asked for a remand to the Trustees for them to consider additional evidence. Mr. Talmon completely neglects to describe what additional evidence he wanted the lower court to consider and in what respect the evidence would be relevant to support his claim to a pension benefit requiring 30 years of service credit. Because Mr. Talmon did not raise the argument in the lower courts that he was deprived of due process by the application of the arbitrary and capricious standard, he should not be allowed to raise it for the first time before this Court. *Glover v. U.S.* 531 U.S. 198, 205 (2001).

Mr. Talmon's due process argument is particularly unpersuasive because, as pointed out by the Sixth Circuit, even if he established full years of contributions from 1980 through July of 1984 and full years of credit under Local 293 Pension Plan from 1967 to 1969, "he still would not have established the 30 years of Combined Credited Service (required when a participant leaves covered employment before age fifty) to qualify for a Partial Pension." So, even "if Talmon were awarded credit for all the years in dispute, he would still fall far short of the requisite 30 years of credited service for a Partial Pension." (*Pet. for Cert., App. A, p. 4A*).

B. Application Of The Arbitrary and Capricious Standard Is Consistent With Due Process.

Mr. Talmon argues, that the application of the arbitrary and capricious standard deprives him of a property interest. He states that the Due Process Clause was intended to promote fairness by requiring the government to follow appropriate procedures. (*Pet. for Cert.* p. 6). But Mr. Talmon's argument has no basis in fact or law. He was treated fairly and appropriate procedures were followed in his case. He points out no additional evidence which would have supported his administrative appeal, which was not in the administrative record and considered by the Trustees (and thus also reviewed by the lower courts). He only makes the vague argument, that if a *de novo* review was conducted in the district court, he would have been able to "provide important relevant evidence to the court indicating that he did not suffer a break in service . . ." (*Pet. for Cert.* p. 5). But, earlier in his petition, he concedes that the Trustees considered, and rejected, evidence he offered that he did not have a break in service. (*Pet. for Cert.* p. 2). Mr. Talmon could not be any more clear in describing what evidence he presented in his administrative appeal and what the Trustees considered. He lists the evidence in the administrative record which he says supported his appeal and states, "all of the foregoing was

submitted to Respondent by Petitioner to no avail." (*Pet. for Cert.* p. 3). So, as a factual matter, nothing shows that Mr. Talmon was prohibited from presenting any additional evidence in the administrative record which would have swayed the Trustees in his favor. In fact, his petition supports the opposite conclusion. He lists all the evidence that was before the Trustees, including the investigation by Frank Burdell, and only complains that it was submitted by him "to no avail." (*Pet. for Cert.* p. 3).

And, as a matter of law, Mr. Talmon also comes up short. Settled law in the Sixth Circuit already holds that evidence outside of the administrative record may be offered in support of a procedural challenge to an administrator's decision, such as an alleged lack of due process afforded by the administrator. *Wilkins v. Baptist Healthcare System, Inc.*, 150 F.3d 609, 618-619 (6th Cir. 1998). In a later case, the Sixth Circuit noted that the *Wilkins* panel foresaw occasions in which the procedural process of gathering all pertinent information may have broken down at the administrative level. In that circumstance, if discovery into the alleged procedural defects supports the plaintiff's allegations of due process denial, then a district court is obligated to permit discovery. *Moore v. LaFayette Life Insurance Company*, 458 F.3d 416, 430-431 (6th Cir. 2006). But, Mr. Talmon did not complain about any lack of procedural fairness in the courts below, and did not invoke the existing safeguard designed to protect his procedural rights. Mr. Talmon wants this Court to grant his petition because he says that he was not afforded due process under the arbitrary and capricious standard, and that a *de novo* review would have allowed him to provide important relevant evidence to the court. He seems to argue that a *de novo* review should be used in every case of a benefits claim under § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). But Mr. Talmon never complained in the lower courts that he had any additional evidence to offer. If he had complained to the district court that he wanted to supplement the administrative

record then, under settled authority, the court would have considered whether due process required any evidence to be considered beyond the administrative record. *See, e.g. Wilkins, id.* at 618.

The facts of Mr. Talmon's administrative appeals and the decisions of the lower courts support the conclusion that he was granted exemplary due process at every level. Under ERISA § 503, an administrator must provide a claimant with written notice and a reasonable opportunity for a full and through review of any denial by the plan administrator. 29 U.S.C. § 1133. If there is a violation of this rule, then the appropriate remedy is to ask the district court to reconsider the denial of benefits after the claimant has been given the opportunity to submit additional evidence. *University Hospitals of Cleveland v. South Lorain Merchants Association*, 441 F.3d 430, 434 (6th Cir. 2006). But the fact of the matter is, the administrative record shows that Mr. Talmon had every opportunity, on several occasions, to present whatever evidence he thought was relevant for consideration during the administrative appeals process. If he provided the evidence to Central States, it would be in the administrative record reviewed by the district court. The administrative record highlights several examples of the procedural safeguards afforded Mr. Talmon during the administrative review process.

For example, on March 14, 1994 Mr. Talmon was advised by Central States that he did not qualify for a Partial Early Retirement Pension. He only had earned 10.750 years of service credit but he needed 30 years of service credit because he left covered employment before age 50. He was told that if he did not agree with the decision, he had a right to appeal and he was furnished with the administrative appeals procedures. (ASA, p. 540).

On April 20, 1994, he was again given the opportunity to appeal the adverse decision by Central States upon his application for a Partial Early Retirement Pension. Central States

told him that he needed 30 years of service credit to qualify for the benefit and he had not established the service credit needed. Central States also said, "If you feel the decision was incorrect, you have the right to appeal. Please refer to the enclosed appellate procedures." (ASA. p. 530).

On January 28, 2000, Mr. Talmon was again advised by Central States that the Local 293 Plan had informed it that, although he had earned 4.33 years of credit with that plan for the years 1963 to 1968, he incurred a break in service and forfeited the service credit with the Local 293 Plan. Central States also again explained that, because he left employment before age 50, he needed 30 years of service credit to become eligible for a higher benefit. (ASA. p. 516).

On February 19, 2002, Mr. Talmon's attorney was told that no administrative appeal had ever been filed by Mr. Talmon. (ASA. p. 509). Mr. Talmon's appeal was subsequently filed, and on October 14, 2002 Central States told Mr. Talmon and his attorney that his appeal would be considered by the Central States Benefits Claim Appeals Committee. (ASA. p. 501). Mr. Talmon through his attorney, furnished Central States a detailed submission, including the arguments that he did not suffer a break in service with the Local 293 Plan and that he should have been given an opportunity to continue working after ICX went of business in Ohio in 1980, because the company continued to operate in other locations. The Benefits Claim Appeals Committee considered his arguments but denied Mr. Talmon's appeal. (ASA. p. 466). On January 3, 2003, the Benefits Claim Appeals Committee explained the reasons for its denial of his appeal. A determination letter pointed out the Committee found that Mr. Talmon was not eligible for a Partial Early Retirement Pension because he had not established 30 years of combined service credit. The Committee pointed out that the Local 293 Pension Plan told Central States that Mr. Talmon had sustained a break in service in December of 1966 with that plan. The Committee also pointed out that no contributions were required to be

made for Mr. Talmon after July 26, 1980, when he was placed on layoff by ICX. And, in any case, even if he established full contributions between 1980 through July of 1984 and full years of credit with the Local 293 Plan from 1967 to 1969, he still would have not have established the 30 years of combined service credit he needed to qualify for an increased benefit.' (ASA, p. 463).

Mr. Talmon appealed the adverse decision of the Benefits Claim Appeals Committee to the Trustees. His attorney again submitted a comprehensive appeal for him. His attorney submitted a Summary of Arguments for the Trustees. (ASA, p. 296). The materials submitted for Mr. Talmon included affidavit evidence (with an affidavit from Frank Burdell) and affidavits from co-workers. Mr. Talmon and Mr. Burdell made a personal appearance before the Trustees. The Minutes of the Trustees' meeting of March 23, 2005 shows that the Trustees considered all the evidence submitted by Mr. Talmon and his attorney. They considered the arguments made during the personal appearance. A written submission on behalf of Mr. Talmon was distributed and reviewed by the Trustees. But, based on all the evidence, the Trustees still denied the appeal. (ASA, pp. 281-282). Mr. Talmon may not like the final result, but he can hardly complain of a lack of due process. He had every opportunity to submit all relevant evidence and arguments to the Trustees, both in writing and in person.

ERISA Section 503 requires that every participant whose claim for a benefit has been denied have a reasonable opportunity for a full and fair review by the fiduciary of the decision denying the claim. 29 U.S.C. § 1133. That is the essence of due process. The administrative record demonstrates that the requirements of Section 503 were met. Mr. Talmon was advised at every stage of the review process of the reasons why he did not qualify for a Partial Early Retirement Pension (he was substantially short of the 30 years of credit needed to qualify for the benefit). Mr. Talmon received

a full and fair review by the fiduciary. And, significantly, it was apparent to both the district court, and circuit court, that the break in service issue regarding his pre-1969 service credit was decided by a totally separate pension fund (the Local 293 Plan). The district court pointed out that the break in service issue was something that Mr. Talmon should have taken up with the other fund. It said, "Talmon has pointed to no provision in the Central States Pension Plan which gives Central States authority to credit service that another pension plan asserts was forfeited." (*Pet. for Cert.* App. B, p. 18A).

CONCLUSION

This Court has reserved its certiorari power for cases of peculiar gravity and general importance or to secure uniformity of decision. In this case, there is no issue of general importance to be decided nor any question of a split of authority among the circuit courts. Mr. Talmon wants this Court to grant his petition because he says the application of the arbitrary and capricious standard by the district court violated his due process rights. But, Mr. Talmon raised no issue of a lack of constitutionally protected due process in the courts below. Moreover, it is already settled law in the Sixth Circuit (and Mr. Talmon points no contrary authority in any other circuit), that a court may consider evidence outside the administrative record, if there is a claim of a violation of due process. So, this Court may wonder, what else does Mr. Talmon want this Court to decide? Does he want this Court to overrule *Firestone*? Does he contend that the arbitrary and capricious standard is never appropriate in an ERISA Section 502(a)(1)(B) benefits case?

And, how is it possible that Mr. Talmon, with a straight face, can claim that he was not afforded exemplary due process at every stage of the proceedings? Mr. Talmon never asked to submit additional evidence to the Trustees or to the district court. If he had complained in the lower courts that he was deprived of due process, because the Trustees did not

consider some important argument relating to his break in service, then under *Wilkins*, the district court would have been obligated to consider whether his complaint raised a due process issue. But he never made that claim.

And, for the sake of argument, even assuming everything Mr. Talmon argued in his petition has merit, nonetheless, there still would be no reasonable basis for this Court to grant his petition. It is clear from all the evidence before the district court and the Sixth Circuit, that the decision regarding Mr. Talmon's break in service, which resulted in the forfeiture of his pre-1969 credit, was a decision made by the Local 293 Plan, and not by Central States. The district court gave Mr. Talmon good advice when it said that if he did agree that his credited service, based upon contributions made to the Local 293 Pension Plan between 1963 and 1969 was forfeited, that was an issue he should have taken up with that plan. (*Pet. for Cert. App. B, p. 18A*).

The Sixth Circuit also recognized the futility of Mr. Talmon's position. It pointed out that even if the Central States Trustees had concluded that Mr. Talmon established full years of contributions between 1967 and 1969 and from 1980 to 1984, "he still would not have established the thirty years of Combined Credit Service (required when a participant leaves covered employment before age 50) to qualify for a Partial Pension." (*Pet. for Cert. App. A, p. 4A*)

Mr. Talmon's petition has no merit and it should be denied.

Respectfully submitted.

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